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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 196

IRWIN FRUCHTMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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In his Memorandum for the United States, the Solicitor General ignores the high standard of candor owed by his Office to this Court.

Question One—Directing a Verdict on an Essential Element

May a trial court direct a verdict on an essential element of an offense, upon the ground that the facts underlying that element are "undisputed"?

The Solicitor General does not deny the existence of a square conflict among the circuits on this question.[1]

[1] The First, Third, Fifth and Seventh Circuits hold that there is no such power in the trial court; the Fourth, Sixth and Ninth Circuits have held precisely otherwise. (See Pet. pp. 7-9).

Neither does his Memorandum dispute that the existence of a "proceeding" is an element of the "obstruction" charge, essential to the prosecution's proof, which this jury was precluded from considering. Instead, the Solicitor General seeks to persuade this Court that this case is not an instance of the circuit conflict—that it does not present the question:

> whether a trial court may withdraw a *factual* question from the jury on the ground that the government has irrefutably established the existence of the fact or because the fact is not in dispute. (Gov't. Mem., p. 5) (emphasis in original)

The Government's italics seek to convey the impression that the "proceeding" question was only an issue of law "properly for the court to decide and not the jury. . . ."[2] (Gov't. Mem., p. 5).

The Solicitor General fails to inform the Court, however, that the trial court explicitly acknowledged taking a factual issue from the jury and doing so upon the ground that there was no dispute. In its post-trial opinion, the trial court wrote:

> In view of the undisputed fact of the investigation the submission of an issue of fact in this respect was not required. (J. App. 96)

The trial court was in a position to know that there is no rational basis for regarding the question as a

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[2] Curiously, the Solicitor General halfheartedly contradicts his own position that the jury was properly denied an opportunity to consider the issue. He implies in footnote 5 that another trial court instruction may indirectly have granted such an opportunity. This argument is not new; it was affirmatively rejected by the Court of Appeals when it determined that the trial court had indeed taken the question from the jury. (Pet. App. 3a)

matter of law. In common sense terms, it is difficult to fathom how it is other than a question of *fact* to ask whether there actually occurred those investigative events alleged to constitute a "proceeding". And fully in line with common sense, the factual and legal issues were clearly distinguished at trial. The legal question is the problem of defining the characteristics of an event that the statute contemplates as a "proceeding".[3] This definitional question is "properly for the court to decide" and thus was presented in the motion for judgment of acquittal. The motion required the court to define what minimum degree of formality a field investigation must have, as a matter of fact, before it rises to the dignity of "proceeding", as a matter of law.[4]

The trial court denied the acquittal motion without articulating a minimum definition. But even in the absence of such an articulated standard, the denial of a motion for acquittal does no more than decide that the Government has presented evidence of facts, sufficient for a jury to evaluate, that would, *if a jury be-*

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[3] We therefore do not disagree with the Court of Appeals that "The definition of 'proceeding' as used in the statute was a question of law to be determined by the court rather than the jury." (Pet. 3a) But that was all the court said. It therefore never answered the question presented whether the jury could properly be denied the opportunity to evaluate the evidence under the definition.

[4] Surely there are some activities of a field investigator so devoid of authorization or so informal that they do not merit the protection afforded by regarding those activities as within either the definition of "proceeding" or the ambit of any other statutes that protect agency investigations. See e.g., 18 U.S.C. § 1001 and 15 U.S.C. § 50 (FTC).

lieves the evidence, permit the conclusion that the legal definition of "proceeding" had been satisfied.[5]

Accordingly, at the close of trial, the defense turned to the factual question by submitting a requested instruction that would have permitted the jury to perform its traditional function in assessing whether the facts of the alleged investigation were actually proved by the evidence. But the court not only rejected the requested instruction, it took the factual issue from the jury by instructing that the investigation, as it was testified to, actually took place in that form and therefore "was a proceeding". (J. App. 609)

The weakness of the Government's position is abundantly manifest in its misleading case citations. Contrary to the Solicitor General's suggestion (Gov't. Mem., p. 5), there were *no* cases cited by the Court of Appeals on the judge-jury point. The Court of Appeals could not have made plainer that the three cases it cited dealt only with the breadth of the legal definition and not with the fact-finding role of the jury under the definition. Indeed, two of three cases could not

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[5] Indeed, by arguing otherwise here, the Government reverses the position it took in argument on the acquittal motion:

> Mr. McDowell:
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> *The only way I can take Mr. Fuller's argument is that there aren't facts enough in the record to demonstrate a proceeding [in] law so we can't send this to the jury*, but as I review the record, the record is replete with facts indicating the nature of what Mr. Smeraldi was conducting was a proceeding under 1505.
>
> *Of course, whether or not the jury chooses to believe this, this is up to them* but if they do believe he was conducting a proceeding, if they believe Mr. Smeraldi was in Detroit and he was here and they believe him, what he says, then this is a proceeding under 1505. (J. App. 461) (emphasis supplied)

have presented the jury issue since they arose at stages in the criminal process prior to any jury consideration. *United States* v. *Batton*, 226 F. Supp. 492 (D.C.D.C. 1964) (motion for acquittal at close of Government's case); *United States* v. *Brumfield*, 85 F. Supp. 696 (W.D. La. 1949) (pre-trial motions). And the third case, also concerned only with the legal scope of "proceeding", contains not the faintest suggestion that the factual issue was taken from the jury. *Rice* v. *United States*, 356 F.2d 709, 715 (8th Cir. 1966). The Solicitor General's reference to *Baines* v. *United States*, 378 F.2d 646 (5th Cir. 1967) adds no more. In that perjury case the jury was *not* precluded from considering the issue of "materiality". "The question of materiality *was* submitted to the jury."[6] 378 F.2d at 650 (emphasis added) Likewise without pertinence is the citation: "cf. also *Hanna* [*sic*] v. *Larche*, 363 U.S. 420, 442, 446". (Gov't. Mem., p. 5) *Hannah* was a non-jury, non-criminal case which does not even remotely discuss the proper distribution of functions between judge and jury.

Accordingly, there is no basis for concluding either: (1) that the trial court did anything other than take an "undisputed" factual element from the jury or (2) that it had a firm foundation in law for doing so. The case thus fits squarely within the conflict, now ripened among seven federal circuits. It is a conflict that calls for resolution by this Court, since federal criminal

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[6] The *Baines* court also wrote that "materiality" was a "question for the court in the first instance," and later that "materiality was "a matter of law." 350 U.S. at 649, 650. Arguably, unlike the question of historical fact presented here, "materiality" should have been kept from the jury since it involves assessment of the legal significance of false testimony. But even in *Baines*, the jury function was not curtailed.

statutes are replete with essential elements that repeatedly present the judge-jury question. (E.g., "commerce", 18 U.S.C. § 1952, 29 U.S.C. § 186; "examination", 18 U.S.C. § 1505; "matter within the jurisdiction", 18 U.S.C. § 1001; "inquiry or investigation", 18 U.S.C. § 1505.)

Question Two—Unlawful Indictment Amendments

To convey the impression that the indictment amendments were merely designed to correct an error in a citation, permissible under Rule 7(c), Fed. R. Crim. P., the Solicitor General misrepresents the record. His Memorandum states that "the defense brought to the attention of the court . . . that the *wrong provision* of Title 15 had been alleged in the indictment. (A. 117-119)." (Gov't. Mem., pp. 3-4) (emphasis supplied)

This Court will search those record pages in vain for any such statement. To the contrary, the defense consistently urged that since the grand jury's indictment referred to the subject of the FTC investigation by specific reference to an existing antitrust statute, that statutory reference was the one "the Grand Jury considered . . . and it so alleged in its indictment." (A. 118) Accordingly, the defense strenuously objected to any amendment of the Grand Jury's allegations and moved, in precise terms, to limit proof to the indictment allegation in its returned form, and to strike that portion of the Government's opening statement departing from it. (A. 118) And indeed the defense brought to the attention of the trial court record evidence that government antitrust attorneys had likewise considered the subject for inquiry to be the one subsequently alleged by the Grand Jury's statutory reference. (A. 134-45, 166-67).

It is no answer that "the nature of the FTC investigation, which petitioner was charged with having obstructed, was spelled out in the *factual allegations* . . ." (Gov't. Mem., p. 4) (emphasis supplied) The statutory reference was itself a critical factual allegation—a shorthand description of the subject of the investigation allegedly obstructed. The Government thus asks this Court to guess which among the factual allegations the Grand Jury "really" meant. That is the very kind of "subsequent guess as to what was in the minds of the grand jury" that *Russell* v. *United States* prohibits. 369 U.S. 749, 770 (1962). If it were not prohibited, this Court could as well have "guessed" from the questions asked and alleged in *Russell* what "subject was under inquiry" by the subcommittee. 369 U.S. at 752-53, n. 4. Notably, the Government needed two guesses in this trial since two indictment amendments were made—all to correct what is now tendered as an obvious "formal mistake". (Gov't. Mem., p. 4)

The *Russell* case likewise answers the Government's argument that an amendment is "one of mere form" as long as a defendant is

> fully apprised of the charges against him so as to permit preparation of his defense and bar any subsequent prosecution for the same conduct. (Gov't. Mem., pp. 4-5)

These criteria, geared to surprise and double jeopardy, cannot be the tests for "mere form" since even a *substantial* amendment, more than "a matter of form", can meet these tests if it is accomplished sufficiently prior to trial and drafted with precision. The Government's criteria would thus nullify *Russell's* effort to secure the Fifth Amendment's Grand Jury guaranty, for they would permit a defendant to "be

convicted on the basis of facts not found by, and perhaps not even presented to the grand jury," 369 U.S. at 770, so long as these facts are added to the indictment in time to avoid surprise and with a precision sufficient to avoid double jeopardy. Yet the very purpose of *Russell's* single exception for "matters of form" was to ensure that, except for the most trivial changes, a defendant may be "convicted solely on the charge made in the indictment the grand jury returned." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). *Accord: Ex Parte Bain*, 121 U.S. 1 (1887), *reaff'd. in Russell* at p. 771.

United States v. *Debrow*, 346 U.S. 374 (1953), the only other case cited by the Solicitor General, involved no amendment and thus presented circumstances to which the Government's criteria *are* relevant. For then the question is whether an indictment, *in the form returned by the grand jury*, is yet sufficient to enable defense preparation and protect against subsequent prosecution.

It is all too easy to conclude that since only the "addition of parentheses" (A. 79) was involved here, there must have been only a mistake of "mere form". (Govt. Mem., p. 5) But it was no more than an added comma in *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2nd Cir. 1961) and a single letter in *Carney* v. *United States*, 163 F.2d 784 (9th Cir. 1947) that required reversal once it was determined that these seemingly trivial "corrections" had, as here, substantially changed the Grand Jury's factual charge.[7]

[7] Moreover, a reading of these cases will confirm that they entailed relatively less drastic surgery since, in unamended form, the *Consolidated Laundries* and *Carney* indictments did not refer to substantially realistic factual possibilities. In this case one statutory investigation was changed to refer to quite another.

This case pays no such proper respect to the Fifth Amendment's Grand Jury guaranty. Since it radically expands the *Russell* exception for "matters of form" and engrafts yet another under Rule 7(c), Fed. R. Crim. P., it should be reviewed in this Court.

Question Three—Mandatory Suppression Hearings on Abuse of Process Claims

The Solicitor General represents that this case involves:

> simply a situation where a bona fide tax investigation uncovered *incidentally* evidence of other criminal violations. And . . . this simple fact in no way inhibits *the government* from proceeding with respect to the other violations. (Gov't. Mem., p. 7) (emphasis supplied)

The italicized words conceal the nub of petitioner's case. We respectfully refer the Court to petitioner's Question Presented No. 3 [8] for documentary proof that once *some* evidence of non-tax violations was found by the IRS it expressly and intentionally pursued *further* non-tax evidence by abusing its power to issue tax process. Such behavior cannot be characterized as uncovering evidence "incidentally". Petitioner does not dispute that upon evidence "incidentally" discovered, "the government" may proceed to develop a case. Petitioner does contend that such initial evidence must be turned over to proper authorities for processing. The IRS is *not* the proper authority when the lead is to non-tax crime and it uses limited tax process to disguise a continuing non-tax investigation. Since there exists record evidence to document that abuse, a sup-

[8] Filed by order in typewritten form under seal.

pression hearing to define its extent and uncover its fruits was improperly denied.

The Solicitor General tucks away in a footnote, (n. 7, p. 5) the relevance of *Donaldson* v. *United States,* No. 942, 1969 Term, *cert. granted,* March 30, 1970. In acquiescing in the petition for review, the Solicitor General stressed the need for a determination of the scope of this Court's statement that an IRS summons, limited in purpose by 26 U.S.C. § 7602, may not be issued "for the improper purpose of obtaining evidence for use in a criminal prosecution . . . ." *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964). But in *Donaldson,* the allegedly "improper purpose", though criminal, was at least tax in nature. This case presents the IRS acting as the FBI in disguise, pursuing evidence of non-tax crimes with the tax summons power. We therefore agree with the Solicitor General that the "question here is . . . fundamentally different" from *Donaldson* (Gov't. Mem., p. 7, n. 7), but only in that the cause for review in this Court is substantially more pressing.[9]

Respectfully submitted,

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[9] The Government's Memorandum does not even address petitioner's contention that a suppression hearing was improperly denied to test his claim that he was wrongfully induced into cooperation with the IRS, when the Service failed to inform him accurately of the nature of its investigation.

LIBRARY
SUPREME COURT, U.S.

No. [redacted]

In the Supreme Court of the United States

October Term, [redacted]

[redacted]

Appellant,

v.

United States of America,

Appellee.

On Motion for a Stay of Execution Pending Appeal to the United States Court of Appeals for the [redacted] Circuit

MEMORANDUM FOR THE UNITED STATES OPPOSING MOTION

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1625

IRWIN FRUCHTMAN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury in the United States District Court for the Northern District of Ohio of offenses under 18 U.S.C. 1505 involving interference with a Federal Trade Commission investigation into pricing agreements in the steel industry.[1] The court of appeals affirmed (Pet. App. 1–7), and thereafter denied a petition for rehearing *en banc* (Pet. App. 7).

In April 1962, the Federal Trade Commission began an investigation into resales by Donovan Wire & Iron

[1] He was convicted on conspiracy and substantive counts, sentenced to concurrent terms of a year and a day, and fined $10,000. $10,000.

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Company of Toledo, of which Mr. Fruchtman was vice-president, of steel purchased from McLouth Steel Corporation of Detroit under a private discount agreement. A Robinson-Patman Act violation might have been involved if Donovan had resold the steel domestically under the discount agreement, but not if the steel had been sold to foreign purchasers. In the course of this 1962 investigation, Fruchtman provided the Federal Trade Commission's investigating attorney with 1,000 invoices purporting to show that the steel had been sold to Canadian purchasers; these induced the investigator to recommend against prosecution and the Federal Trade Commission closed its investigation.

Several years later, the Internal Revenue Service commenced an independent tax investigation of Donovan, one of the purposes of which was to ascertain if Donovan had reported and paid taxes on its alleged income (some thirty-three million dollars) from these purported Canadian sales. As a result of a 1966 Internal Revenue Service examination of the records of Donovan and McLouth, it was determined that the invoices previously submitted by Fruchtman to the Federal Trade Commission had been falsified. After reviewing the original Federal Trade Commission file, the Internal Revenue Service reported this matter to the Department of Justice. The Department thereupon subpoenaed the Federal Trade Commission file and the relevant corporate records of the Donovan and McLouth companies, including the pertinent invoice records (see *e.g.*, A225–278, 424–430).[2] It submitted to

[2] We are filing herewith the two-volume joint appendix utilized in the court of appeals.

the grand jury the relevant company records as well as live testimony (principally from employees of these companies) to the effect that the steel, contrary to Fruchtman's representations, had been sold domestically. An indictment was thereafter returned charging interference with the Federal Trade Commission investigation, and petitioner was convicted.

Each of the contentions raised in the petition was considered and rejected in the thorough opinion of the court of appeals. We rely basically upon that opinion, but believe it appropriate to add some observations.

1. Petitioner advances a detailed argument to the effect that the indictment was improperly amended at trial in derogation of his constitutional rights (Pet. 9-15). In relevant part, the indictment as returned by the grand jury charged that petitioner sought corruptly to obstruct the FTC investigation (in violation of 18 U.S.C. 1505) "concerning possible violations of Title 15, United States Code, section 13*a*" by submitting to the FTC Investigator "approximately 1,000 false invoices which the defendant * * * knew to be false and misleading, concerning a matter material to said investigation and inquiry, that is concerning whether Donovan Wire & Iron Company sold approximately 236,000 tons of prime, commercial quality, cold rolled steel to three Canadian corporations, * * *" (A. 13, 15; emphasis added). After the opening statement of government counsel, the defense brought to the attention of the court that while export to Canada would not be a defense under 15 U.S.C. 13*a*, it would be under 15 U.S.C. 13(*a*),

and that the wrong provision of Title 15 had been alleged in the indictment (A. 117–119). The government responded, as it had to pretrial motions in this regard, that the facts concerning the investigation necessarily referred to Section 13(a) and that the reference to Section 13a was merely an error in form. After considering the matter, the district court issued an order amending the indictment[3] to refer to 15 U.S.C. 13(a), pointing out that the "addition of parentheses * * * makes the statutory citation conform to the substantive charges * * * [since] the matter of export, contained in the substantive charges, was not material to * * * 15 U.S.C. 13a, as the section of 15 U.S.C. originally was cited" (A. 79, 75–80).[4]

This ruling was correct. The nature of the FTC investigation, which petitioner was charged with having obstructed, was spelled out in the factual allegations; this description made it clear that the investigation was being conducted under section 13(a) and that the statutory reference to 13a was a formal mistake. Petitioner was thus fully apprised of the charges against him so as to permit preparation of his defense and bar any subsequent prosecution for the same conduct.

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[3] Initially, the court had granted the government's motion to amend by simply striking the letter a; it thereafter changed its order as set forth in the text (A. 77).

[4] As defense counsel pointed out to the court (A. 120), Section 13a deals with discriminatory rebates, discounts and advertising charges where the fact of export would have no relevance as a defense; moreover, the FTC has no enforcement power with regard to Section 13a (see A. 127–133). 15 U.S.C. 13(a), however, makes it unlawful to discriminate in prices only where the commodity is resold within the United States, and gives the FTC investigatory authority.

United States v. *Debrow*, 346 U.S. 374, 376, 378; *Russell* v. *United States*, 369 U.S. 749; see Rule 7 F.R.Cr.P. In these circumstances, the court of appeals properly treated the amendment as one of mere form (Pet. App. 3–4).

2. Petitioner's contention (Pet. 7–9) that the trial court usurped the jury's function by instructing that the FTC investigation was a "proceeding" within the meaning of 18 U.S.C. 1505 is without substance.[5] As the court of appeals held, this issue was properly for the court to decide and not the jury (Pet. App. 3 and cases there cited). See also *Barnes* v. *United States*, 378 F. 2d 646 (C.A. 5), certiorari denied, 390 U.S. 972, relating to materiality in perjury prosecutions; cf. also *Hanna* v. *Larche*, 363 U.S. 420, 442, 446. This case does not therefore raise the alleged conflict of circuits urged by petitioner (Pet. 8–9) as to whether a trial court may withdraw a *factual* question from the jury on the ground that the government has irrefutably established the existence of the fact or because the fact is not in dispute.

3. Prior to trial, the defense moved to suppress all evidence obtained by the Department of Justice on the conclusory ground that it was derived from an Internal Revenue Service investigation improperly used

[5] The jury was further instructed that the government bore the burden of proving beyond a reasonable doubt that in 1962 "Fruchtman had knowledge of said Federal Trade Commission investigation and that this investigation also involved the sale to the Donovan Wire and Iron Company by the McLouth Steel Corporation during the years 1960, 1961, and 1962 of cold rolled steel of prime commercial quality at prices below mill list prices" (A. 96–97).